

July 29, 1997

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

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DECISION ON APPEALS OF CONDITIONAL USE PERMIT.

SUBJECT: Department of Development and Environmental Services File No. **L96AC028**

TORGERSON BASE STATION/SPRINT SPECTRUM (Communication Tower)
Conditional Use Permit Application Appeal

Location: 27118 Wax Orchard Road, Vashon Island

Applicant: Sprint Spectrum, L.P., *represented by:*
Loren D. Combs, Esq.
1102 Broadway, #500, Tacoma, WA 98402

Appellants:

Sprint Spectrum, L.P., Vashon Community Council Curtis Boyer, et al.

represented by: *represented by:* *represented by:*

Loren D. Combs, Esq. **Jake Jacobovitch**

Phillip Hanson

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Tacoma, WA 98402

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Vashon Island, WA 98070

27115 Wax Orchard Road SW
Vashon Island, WA 98070

PRELIMINARY MATTERS:

Application submitted: October 31, 1996
Notice of complete application: November 26, 1996
Date of permit issuance: March 11, 1997
Dates of notices of appeal: March 24, 1997; March 24, 1997; March 25, 1997
Dates of statements of appeal: March 31, 1997; April 1, 1997; April 1, 1997

EXAMINER PROCEEDINGS:

Pre-Hearing Conference: April 29, 1997
Hearing on Motions: June 3, 1997
Hearing on Motions: June 11, 1997
Hearing Opened: July 10, 1997
Hearing Closed: July 10, 1997

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner. On June 4, 1997, the time limits of KCC 20.24.098 were waived by all parties.

ISSUES ADDRESSED:

- Antennae
- Comprehensive Plan Policy application
- Design/aesthetics
- Rural area
- Scenic view protection
- Setbacks
- Height

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. On March 11, 1997 the King County Department of Development and Environmental Services issued a conditional use permit approving, subject to modifications and conditions, construction of a tower and antenna ("monopole") on a site at 27118 Wax Orchard Road, Vashon Island, within unincorporated King County. The Applicant for the permit was Jon & Sharyl Torgerson; the proposed site developer and operator is Sprint Spectrum. The purpose of the monopole is to provide personal communication services.

Timely appeals of the DDES decision were filed by the Vashon-Maury Island Community Council ("VMICC"); Curtis Boyer, et al.; and Sprint Spectrum. VMICC and Boyer contest the issuance of the permit for any location on the subject property; Sprint appeals the condition requiring relocation of the site to a more central position on the property, i.e., the imposition of greater set-backs from the west and south property lines than proposed by the applicant.

2. The site and adjacent areas to the north and west are zoned RA-10P. Property abutting to the south, and adjacent properties on the east side of Vashon Highway, are zoned RA-5P. These zones are rural area designations, requiring 10-acre and 5-acre, respectively, minimum lot size. Land in the vicinity and the subject property are developed primarily with low density, single family dwellings on rural sized lots. Some nearby land remains undeveloped.

The P-suffix designation of the zoning refers to area-wide conditions for development on Vashon Island; it does not apply specifically to the proposed development or relate to the issues under consideration in this proceeding.

3. The subject property is 2.85 acres in size, and is developed with a single family home and detached garage. The central portion has been cleared and is used as yard area for the existing home. The area of the property surrounding the yard is wooded with evergreen and deciduous

Although Sprint asserts that it has a right to use only a specific portion of the property, the application relates to the entire, undivided parcel. The east border of the property subject to the application is the Vashon Island Highway; the west border is Wax Orchard Road. The adjacent property to the south is an undeveloped wooded triangle, approximately 1.22 acres in size, the south apex of which is at the intersection of the Vashon Island Highway and Wax Orchard Road.

4. King County Comprehensive Plan Policy R-208 addresses accessory and non-residential uses in predominately residential portions of the rural area. It states:

"Such uses should be limited to those that:

- a. provide convenient local services for nearby residents; or
- b. require location in a Rural Area (for example, some utility installations); or...."

The proposed tower would be constructed and operated to provide personal communication service to south Vashon Island (including Maury Island). Mainland areas of south King, north Pierce, and eastern Kitsap Counties would experience some incidental signal enhancement from an antenna on the Torgerson property, but those areas all receive primary service from antennae located, or to be located, on the mainland. It is not the purpose of this proposal to establish or improve service to any location other than south Vashon Island and Maury Island.

The only technical information provided shows that it would be impractical for Sprint Spectrum to serve south Vashon Island from the mainland. Antennae of far greater height (in the range of 500 feet) would be necessary to penetrate Island vegetation from the mainland. The signal from a tower of that height would cause substantial interference in other service areas.

5. Policy R-208 also provides that these limited uses should be sited and designed to insure protection or enhancement of rural character and preserve the components of the Rural Area listed in policy R-101. Policy R-101 declares that a fundamental objective of the King County Comprehensive Plan is to maintain the character of its designated Rural Area. Therefore, King County's land use regulations and development standards are encouraged to protect and enhance the following components of the Rural Area:

- a. Environmental quality, particularly as evidenced by the health of wildlife and fisheries (especially salmon and trout), aquifers used for potable water, surface water bodies and natural drainage systems;
- b. Commercial and non-commercial farming, forestry, fisheries, mining and cottage industries;
- c. Historic resources, historical character and continuity including archaeological and cultural sites important to tribes;
- d. Community small-town atmosphere, safety, and locally-owned small businesses;
- e. Economically and fiscally healthy rural cities and unincorporated towns and neighborhoods with clearly defined identities compatible with adjacent rural,

- agricultural, forestry and mining uses;
- f. Regionally significant parks, trails, and open space; and
- g. A variety of low-density housing choices compatible with adjacent farming, forestry and mining and not needing urban facilities and services.

Consistency or inconsistency of a monopole communications antenna with the rural area is a matter of judgment. The King County Zoning Code permits this use in the rural area, subject to the conditional use permit process. None of the components of the rural area specifically listed in policy R-101 are directly or substantially affected by the proposal.

6. The Appellants VMICC and Boyer raise the issue of need for this personal communications tower to serve the residents of south Vashon Island. Personal communications services are provided by private businesses, and their offering is dictated by commercial considerations. Section 704 of the Telecommunications Act of 1996, Section 332(c), addresses mobile services. The Act generally preserves local zoning authority, but limits decisions regarding the placement, construction and modification of personal wireless service facilities as follows:
 - "(b). Limitations-
 - (i). The regulation of the placement, construction and modification of personal wireless service facilities by any state or local government or instrumentality thereof-
 - (I). Shall not unreasonably discriminate among providers of functionally equivalent services; and
 - (II). Shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

King County permits the construction of antennae for such services, subject to each proposed facility meeting the criteria for a conditional use permit.

7. The primary issue with respect to whether the proposal meets the criteria for a conditional use permit is the effect of the appearance of the proposed antenna. The relevant provisions of KCC 21A.44.040 require design in a manner which is compatible with the character and appearance of existing or proposed development in the vicinity; that the location, size and height of the structure, and screening vegetation, not hinder neighborhood circulation or discourage permitted development or use of neighboring properties; and that the use be designed in a manner that is compatible with the physical characteristics of the property on which it is to be located.

The Appellants VMICC and Boyer, as well as many additional residents in the area, consider the proposed antenna incompatible with the rural and natural appearance of the proposed site and surrounding properties. The depth of their concern and their abhorrence for the proposed structure is clear and unquestioned. Nonetheless, electrical transmission and broadcasting towers have been a common sight in rural areas from the inception of electrification and radio broadcasting. Such facilities are not, per se, out of character with the rural area. No evidence of any particular characteristics of the design of this structure or this site shows unusual elements of incompatibility.

8. At the hearing the applicant proposed a reduction of the height of the monopole from 152 feet to 120 feet. The reduced height would bring the top of the antenna closer to the adjacent

treetops than originally proposed. Many trees on the site are approximately 80 feet tall; a few are close to 100 feet in height. The portion of the site proposed to be used for the tower is heavily wooded, so that the base support equipment of the antenna structure will be screened from view to tree height. Development conditions imposed by the responsible official, and agreed to by the Applicant, require landscaping at the base of the fencing surrounding the south and east sides of the project area, and retention of the existing perimeter vegetation on the site. The lower 60 feet of the tower is required to be painted in a color which will blend in with existing trees on the site.

9. With the limitations and conditions of this permit, the monopole will be constructed in a manner which is compatible with the character and appearance of rural residential development, to the extent that such compatibility is reasonably possible. The proposal will not hinder neighborhood circulation. There is no evidence that the monopole will, to a significant extent, discourage any uses of neighboring properties authorized by the RA zone classification. A maximum height of 120 feet, which is roughly 20 to 40 feet above tree height, is reasonably compatible with the physical characteristics of the subject property.
10. The Vashon Maury Island Community Council is formally recognized by King County as an unincorporated area council. (Motion 9859). King County Council motion no. 9643 and County Executive order PRE 7-1, "Citizen Participation Initiative", require that recognized unincorporated area councils be provided information on programs and plans of the County departments, in a time frame sufficient to allow the Council to provide meaningful input throughout the development of the program. Departments are also required to respond in a timely fashion to requests from unincorporated area councils on issues raised by the communities they represent, and shall give due consideration to the council's comments on matters affecting the quality of life in their communities.

The motion and executive order do not, however, call for an additional citizen review process for development proposals. These normally follow a review process which allows for citizen comment or participation. The executive order specifically provides that unincorporated area councils are to receive notice of, and may review and comment on, land use applications pursuant to all provisions of the King County Code. The Vashon Maury Island Community Council received notice of this proposal, has provided comments, and has been afforded substantial opportunity to participate in the County's final decision on the application through the appeal process resulting in this decision.

11. The additional setbacks from the west and south property lines required by the March 11, 1997, decision are intended to result in greater separation between the monopole and nearby homes, and reduce the visibility of the pole from developed residential properties to the west. The additionally required setbacks from the west and south are claimed to substantially reduce the visible portion of the tower above the tree line. Report and Decision, Conclusions/Analysis 4, pp 13 - 14.

Reduction of the tower height by approximately 30 feet could result in an equivalent or greater reduction of the visible portion of the tower above the tree line, as would the increased setbacks. Visibility of the tower also will be affected by the height and density of the vegetation which surrounds the structure. Photographs in evidence demonstrate the importance of the precise location of the structure as a factor in determining its visual impact on nearby residents and on persons traveling on roads in the vicinity. Visibility of the tower could be diminished by

requiring its precise location to be determined with consideration of available vegetative screening. A landscape architect or other qualified professional would be able to evaluate impacts of minor changes in location on the tower's visibility from various perspectives.

CONCLUSIONS:

1. Because it will provide service available to nearby residents, and requires location in the rural area in order to do so, the proposed development is consistent with King County Comprehensive Plan Policy R-208, governing accessory and non-residential uses in the predominantly residential portion of the rural area of King County.
2. The proposal is not inherently incompatible with rural character, rural residential development, or other uses and development permitted in the rural area of King County. It is not inconsistent with the components of the rural area listed in Comprehensive Plan Policy R-101.
3. The proposal reasonably meets the criteria of KCC 21A.44.040 for issuance of a conditional use permit.
4. The concern of DDES to have the tower of sufficient height to reduce the need for additional towers, either to better serve Sprint Spectrum customers or to allow for co-location of other communication facilities on the same tower, is reasonable and appropriate. However, no evidence was presented indicating likelihood of construction of additional towers to serve Vashon Island in the event a monopole at this site is constructed to 120 feet, rather than the 152 feet initially proposed. Likewise, no evidence was presented to indicate that co-location of other facilities on the subject tower would be likely if the tower were constructed at 152 feet, or less likely if the tower is constructed at the reduced height. Consequently, advantages of fewer required transmission facilities, or co-location of facilities on a higher tower, are speculative.
5. The Appellants' contention that the service to be offered by Sprint Spectrum is not needed or desired by residents of south Vashon Island is not an issue which the Hearing Examiner has authority to consider.
6. Motion 9643 and Executive order PRE 7-1 do not require greater participation by an unincorporated area council in the project review process than that which was afforded to the VMICC in this proceeding.
7. Although the relocation of the proposed tower to the site proscribed by the responsible official's decision would reduce visibility of the upper portion of the tower from adjacent and nearby residences, the lowering of the tower height, as proposed by the Applicant at the public hearing as an alternative to relocation, would accomplish the same purpose. The location proposed by the Applicant exceeds set-back requirements of King County Code Sections 21A.26.040, and, with the other conditions established by the responsible official and the Hearing Examiner, will screen the lower portion of the tower from view as effectively as relocation to a more central portion of the property. To minimize visual impact to nearby residents and the public traveling in the area, the precise location of the monopole should be determined in consultation with a landscape architect or other qualified, independent professional, hired by the applicant and approved by LUSD, who will review and recommend the location of the structure on the site to take maximum advantage of the screening provided

8. The appeals of the Vashon Maury Island Community Council and Curtis Boyer, et al., should be denied. The appeal of Sprint Spectrum should be granted, subject to revision of the proposal to lower the height of the proposed tower to 120 feet above natural ground level, the addition of a condition of approval which would preclude any increase in the elevation of the tower without issuance of a new conditional use permit, and the addition of a condition of approval to require a professional recommendation for siting the monopole to minimize its visual impact.

DECISION:

The appeals of Vashon Maury Island Community Council and Curtis Boyer, et al. are DENIED. The appeal of Sprint Spectrum is GRANTED, subject to modification of the proposal and conditions, as set forth below.

A conditional use permit is hereby granted to Sprint Spectrum and Jon and Sharyl Torgerson for the construction of a monopole communications tower with an over-all height of 120 feet, with four equipment vaults, for personal communication services, subject to the following conditions:

1. Development shall be generally in accordance with exhibit D-6 regarding configuration of the proposed tower, at the location shown in the said drawing received October 31, 1996, but with a height not to exceed 120 feet above natural ground level. No further modifications to increase the height of the tower above 120 feet shall be permitted, unless approved by a new conditional use permit (or applicable review process then in effect for construction of new personal communication facilities). This condition is not intended to preclude or discourage co-location of additional services and equipment on this tower, within the existing approved height, subject to any applicable review process.
2. The precise location of the tower shall be established following review by a landscape architect or other qualified professional employed by the applicant and approved by LUSD, who will evaluate visual impacts of minor variations in location and recommend a location of the monopole which minimizes adverse visual impacts on nearby residents and persons traveling on roads in the vicinity. The final location shall be approved by LUSD within the project site as shown on the site plan submitted October 31, 1996, or may be relocated, with the applicant's concurrence, to the east or north. Any dispute between the applicant and LUSD concerning the final, precise location of the monopole may be referred to the Hearing Examiner for final determination.
3. Landscaping shall be planted at the base of the fencing surrounding the south and east sides of the project area. The existing natural perimeter vegetation on site shall be retained. Detailed landscape plans shall be submitted at the time of building permit which conforms to the Type II Landscape Type under KCC 12A.16 for landscaping at the base of the project area.
4. Drought tolerant plans shall be shown on plans for the building permit application. A watering plan for maintenance of the landscape is required at the time of building permit to assure that landscaping will grow and mature. The applicant has the option of installing sprinklers or contracting with a business for watering services.
5. The applicant shall submit paint samples at the time of the building permit. The lower 60 feet

- of the monopole tower shall be painted either a brown or green color to blend in with existing res on site. The remainder of the tower and antennas may remain a natural steel color or if painted, the "sky" color shall be approved at the time of the building permit.
6. The applicant shall install sufficient back-up power capable of providing a minimum of eight hours of back-up power supply to the PCS system. The applicant shall install batteries that are "leak proof", reducing the risk of ground contamination, or shall design a special containment system for the back-up power supply.
 7. The applicant shall obtain all necessary building permits for construction of the monopole tower and associated facilities on the subject property and comply with the noise standards per KCC Title 12 as applicable to this facility.
 8. Should this communication facility and transmissions structure no longer be used for communication transmissions in the future, the applicant shall obtain permits as required for removal of all associated facilities no longer in use. Removal of structures shall occur within one year from elimination of operation on the site.
 9. This land use approval action for a Conditional Use Permit shall become null and void if not exercised by obtaining building permits within four years from the transmittal date of this order.

ORDERED this 29th day of July, 1997.

James N. O'Connor
King County Hearing Examiner

Torgerson Base Station/Sprint Spectrum L96AC028

Page 9

TRANSMITTED this 29th day of July, 1997, to the following parties and interested persons:

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Karen Scharer, DDES/LUSD
Angelica Velasquez, DDES/LUSD
Lisa Lee, DDES/LUSD

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding appeals of conditional use permit decisions. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in

Superior Court within twenty-one (21) days from the date of issuance of the decision.

MINUTES OF THE JULY 10, 1997, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L96AC028 - TORGERSON BASE STATION/SPRINT CONDITIONAL USE PERMIT APPLICATION APPEAL.

James N. O'Connor was the Hearing Examiner in this matter. Participating at the hearing were Karen Scharer (representing the County), Loren Combs, Curtis Boyer, Jake Jacobovitch, Phillip Hanson, Anne Woodward, Anne Herfindahl, Kevin Barlay and Michael Norin.

On June 4, 1997, the parties agreed to postponement of the hearing on these appeals to July 10, 1997.

The following exhibits were offered and entered into the hearing record:

- Exhibit No. 1 Fee invoices, October 31, 1996
- Exhibit No. 2 SITUS file information, October 31, 1996
- Exhibit No. 3 Letter to D. Scholl of Complete Application from Karen Scharer, November 26, 1996
- Exhibit No. 4 Letter to Karen Scharer from Anne Leiter dated January 2, 1997
- Exhibit No. 5 Letter to Karen Scharer from Phil Hanson, dated December 23, 1996
- Exhibit No. 6 Letter to Lisa Pringle from Anne Herfindahl, dated December 23, 1996 (including petition)
- Exhibit No. 7 Letter to DDES from David and Pamela Hall, dated December 21, 1996
- Exhibit No. 8 Fax to Tina Gill from Glen Canning, dated December 20, 1996
- Exhibit No. 9 Letter to Karen Scharer from Marty DuPraw, December 19, 1996
- Exhibit No. 10 Letter to DDES from Craig Beles, December 18, 1996
- Exhibit No. 11 Letter to DDES from Mike Wood, received December 17, 1997
- Exhibit No. 12 Letter to Karen Scharer from Donald Code and Joan Wortis, dated January 12, 1997
- Exhibit No. 13 Letter to Karen Scharer from Enid Dolstad, dated January 13, 1997
- Exhibit No. 14 Copy of letter to Greg Nickels from Anne Herfindahl to Phillip Hanson
- Exhibit No. 15 Letter to DDES from Phil Wheeler, December 31, 1996
- Exhibit No. 16 Letter to Karen Scharer from Enid Dolstad, January 15, 1997
- Exhibit No. 17 Letter to Karen Scharer from Les and Joan Street, February 25, 1997
- Exhibit No. 18 Letter to DDES from Anne Woodward, February 28, 1997
- Exhibit No. 19 Photographs taken by staff
- Exhibit No. 20
 - D-1 Application received October 31, 1996
 - D-2 Legal description
 - D-3 Justification/Criteria for approval (including photographs) October 31, 1996
 - D-4 Record of sensitive area review May 3, 1996 (certificate)
 - D-5 Environmental checklist May 3, 1996
 - D-6 Project plans (2 pages) October 31, 1996
 - D-7 Omitted
 - D-8 Assessor's maps
 - D-9 Omitted
 - D-10 Omitted
 - D-11 Fire District Receipt dated February 27, 1997
 - D-12 Letter with attachments to Karen Scharer from Dennis Scholl dated October 31, 1996
 - D-13 Certification and transfer of applicant status dated October 31, 1996
 - D-14 Lot information dated October 31, 1996
 - D-15 Zoning drawing dated October 31, 1996
 - D-16 Communication facilities application requirements received October 31, 1996
 - D-17 Aeronautical study dated October 1, 1996
 - D-18 Letter to Karen Scharer from Kevin Barlay regarding co-location dated February 11, 1997

Exhibit No. 21	E	Omitted
	F	Legal notice to newspapers for publication sent December 6, 1996 and May 7, 1997, publication date December 11, 1996, and March 12, 1997, respectively
	G	Affidavits of Publication received March 26, 1997 (published March 12, 1997)
	H	Notice board/posting notices sent December 2, 1996 and March 6, 1997; dated posted January 3, 1996
	I	Omitted
	J	300/500 foot radius notices dated and sent December 2, 1996
Exhibit No. 22		Determination of Non-Significance dated March 11, 1997
Exhibit No. 23		Report and Decision (Approve with conditions) sent March 11, 1997
Exhibit No. 24		Letter (with attachments) from Karen Scharer to Phillip Hanson dated May 29, 1997
Exhibit No. 25		Snohomish County Council Motion No. 95-078 (concurring with the Hearing Examiner's decision to deny US West NewVector Group conditional use application)
Exhibit No. 26		San Juan County Legal Standards (excerpt)
Exhibit No. 27		Illustration prepared by LUSD staff based on site plan, site visit, staff photographs
Exhibit No. 28		Letter dated January 3, 1997, from Kevin Barlay to Phil Hanson
Exhibit No. 29		Topographical map of Gig Harbor area
Exhibit No. 30		Topographical map of Olalla area
Exhibit No. 31		Topographical map of North Tacoma (Exhibit No. 29 attached to show larger area)
Exhibit No. 32		Map of Gig Harbor area
Exhibit No. 33		Ordinance No. 739 - City of Gig Harbor
Exhibit No. 34		Pierce County Comprehensive Plan excerpts - pages 11-5 and 11-6
Exhibit No. 35		Pierce County Urban Growth Areas map
Exhibit No. 36		Pierce County selected utilities - major facilities map
Exhibit No. 37		FCC publication: Wireless Telecommunications Bureau-Broadband PCS - How to Apply (2 pages, last updated January 16, 1996)
Exhibit No. 38		Letter dated October 23, 1996, from Congressman Rick White to Ms. Susan Lawrence
Exhibit No. 39		Letter dated May 9, 1997, from Congressman Rick White to Ms. Susan Lawrence
Exhibit No. 40		A Community-Based Approach to Antenna Siting (prepared by Sprint/Spectrum)
Exhibit No. 41		Complaint investigation report - King County Office of Citizen Complaints - Ombudsman
Exhibit No. 42		Map of Tahlequah Y neighborhood properties
Exhibit No. 43		Letter dated May 21, 1997, from Eugene A. Smith to Hearing Examiner
Exhibit No. 44		Photograph looking NE across Woodward pasture towards site of Torgerson Base Station
Exhibit No. 45		Photograph of open space west of Torgerson property; view to northeast; photograph taken by Joan Street in March 1997
Exhibit No. 46		Photograph of open space west of Torgerson Property; view to North; photograph taken by Joan Street in March 1997
Exhibit No. 47		Photograph of open space west of Torgerson Property; view to southeast; photograph taken by Joan Street in March 1997
Exhibit No. 48		Tahlequah - coverage prediction
Exhibit No. 49		Photograph from Torgerson property - view to north northeast (simulated)
Exhibit No. 50		Phillip Hanson's written testimony
Exhibit No. 51		Map indicating lot lines and where photographs (Exhibits 52-55) were taken
Exhibit No. 52		Photographic simulation - approximately 400 feet south of originally proposed location (160-foot structure)
Exhibit No. 53		Photographic simulation - Approximately 450 feet southwest of originally proposed location (160-foot structure)
Exhibit No. 54		Photographic simulation - approximately 450 feet south of conditionally approved location (160-foot structure)
Exhibit No. 55		Photographic simulation - approximately 450 feet southwest of originally proposed location (120-foot structure)
Exhibit No. 56		Photographic simulation - approximately 550 feet southwest of conditionally approved location (160-foot structure)

Torgerson Base Station/Sprint Spectrum L96AC028

Page 12

Exhibit No. 57 South Vashon coverage without Tahlequah site

Exhibit No. 58 Vashon Island Community Plan map marked for existing tower locations

Exhibit No. 59 South Vashon coverage with Tahlequah site

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